IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 462 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ESSAR PROJECTS LTD

Versus

STATE OF GUJARAT

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Appearance:

NANAVATI ASSOCIATES for Petitioners

Mr. S.N.Shelat, Advocate General for Respondent No. 1

Mr. Kamal Trivedi for M/S TRIVEDI & GUPTA for Respondent No. 2

Mr. Akshay H. Mehta, Senior Standing Counsel for the Central Government for Respondent No. 3

MR SB VAKIL for Respondent No. 4

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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 11/06/2001

ORAL JUDGEMENT

This petition has been filed for quashing and setting aside the action of the respondent no. 2 Sardar Sarovar Narmada Nigam Ltd. (hereinafter referred to as the "Nigam") disqualifying the petitioner no.1 company for further processing the tender for execution on Turn-key basis of five pumping stations for the Saurashtra Branch Canal of Sardar Sarovar Project as stated in its letter at annexure "U" to the petition.

2. The petitioner no.1 is a company and the petitioner no.2 is a director of the petitioner no. 1 company which is registered under the provisions of the Indian Companies Act and engaged in the business of construction activities such as construction of refineries, steel plants, machine structures, bridges etc. since last 25 years. It is also engaged in the business activities for the Sardar Sarovar Narmada Nigam Ltd. for the past eight years. The respondent no. 1 is a State of Gujarat and the respondent no. 2 is a wholly owned undertaking of respondent no.1. The respondent no. 3 National Thermal Power Corporation Ltd. (hereinafter referred to as NTPC) is the consultants of the respondent no. 2 providing consultancy services for the execution on turnkey basis for five pumping stations for the SBC pumping scheme. The respondent no. 4 M/s. Kirloskar Brothers is one of the offerers for execution on turnkey basis of five pumping stations for the Saurashtra Branch canal. The petitioner company is a class"AA" contractor which is the highest classification awarded by the State of Gujarat. The respondent no. 2 Nigam Nigam is the wholly owned Government company incorporated under the Companies Act and a wholly owned undertaking of the Government of Gujarat. It is engaged in executing a large m ulti-purpose river valley project across the river Narmada. The project located along the West Coast of India envisages the construction of head works of concrete dams, canal-head power house, main canal having capacity of 1133 cumecs and a length of about 458 kms. alongwith 42 numbers of branch canals for serving 1.8 million hectares command area. Out of 42 branches, the Saurashtra Branch Canal of 319 cumecs is considered as a major branch canal and takes off at chainage 263.20 kms. of the main canal near village Kadi of Mehsana district. The SBC is a 104.46 kms. long bridge canal having a discharge of 319.10 cumecs and the full supply of level at the take off point is 61.1 meters. It was proposed to allow the canal to fall which could be utilised in a hydro-electrical power station for generating electricity. For the purpose of lifting water from the depression, and for erection of five pump house plants to

be constructed along with alignment of canal whereby the total lift of the pump houses would be about 71 meters, the Nigam had entered into an agreement with the National Thermal Power Corporation for providing consultancy services for the engineering of the five pumping stations of the SBC pumping scheme. The NTPC had recommended its conclusion that on the basis of the reference available and other technical considerations, the capacity of the main pump had to be 20 cumecs. The respondent no. 2 Nigam issued a public advertisement in The Times of India on 9.5.97 inviting tenders for SBC pumping scheme by way of sealed bids in two parts bidding system for execution on turn-key basis for the five pumping stations for SBC or Sardar Sarovar Project. The work consisted of design, engineering, manufacture, supply, transportation to site, storage, erection, testing and commissioning, operating of the works for two years, to be completed in two phases. Phase-I involved installation of 11 concrete volute pumps, each of 20 cumecs capacity, whereas Phase II involved the setting up of 15 concrete volute pumps each of 20 cumecs capacity. The Nigam appointed NTPC to perform engineering consultancy services. One month thereafter, the Nigam issued a corrigendum on 9.6.97 introducing amendments in the sub-clauses (b)(C) and (e) of clause 1.1 of the tender notice which required that the bidder should have designed, manufactured, erected/sueprvised erection, tested and commissioned at least 2 concrete volute pumps each of capacity of 14 cumecs or more at two different locations. This condition was deleted lateron. According to the petitioner, this was done only in order to make favour to the respondent M/s. Kirloskar Brothers Ltd. whose collaborators have till the date installed only two pumps of 14.3 cumecs each at a single location. The bidders were required to submit their bids either by registered post, speed post or hand delivery before the specified delivery date and time in two parts i.e. Part-I : Envelope-I : This envelope was required to be superscribed "unpriced bid." and shall comprise of qualifications, mm data complete technical proposal including data sheets and drawings and commercial conditions and bid forms excluding the prices. The bid security for an amount of Indian rupees thirty million was required to be enclosed. Part-II: Envelope: II was required to be superscribed " Priced bid" comprising of all the price schedules. This envelope was required to be submitted alongwith envelope-I. Envelope-III was also required to be submitted by the qualified bidder after post-bid conference. This envelope was required to be superscribed "Changes in proposal". The bidders were required to note that envelopes II and III shall be

opened together. It was specifically provided in clause 20 of section 2 to the said contract that the envelope II shall not be opened and shall remain in the custody of the employer until the date of opening of envelopes II and III and that the clarification/additional information, if any, would be sought and further discussions would be held during the post-bid conference with only those bidders who meet the specified qualifying requirements and submit technical and commercially responsive bids and that based on the clarification/additional information and discussion, the employer shall issue amendments to the specification and bidding documents which would be mandatory for the bidders to comply. The pre-bid conference was held at Gandhinagar on 16.7.97 and pursuant to an inquiry by the bidder as to whether there are any reservations if the contractor provides synchronous motors in place of induction motors, synchronous motors may be proposed as an alternative offer with details of hardware required for providing DC supply to synchronous motors. Hence, the petitioner company had addressed a letter to the Nigam stating therein that if the basic parameters are reviewed with practical applications and with regard to the requirements of the project, there could be a substantial saving to the extent of 22% in the evaluated bid price. Another letter dated 13.1.98 was addressed by the petitioner company to the Chief Engineer of the SBC giving information as sought for enclosing therewith a detailed note highlighting the advantages of installation of synchronous motors for high capacity concrete volute pumps. The aforesaid proposal of supplying synchronous motors was rejected. After submission of the tender document, the respondent no. 2 Nigam vide its letter dated 29.12.97 raised queries on qualification requirements. By a letter dated 2.1.98 the petitioner company was required to confirm its evaluation strictly in line with technical specifications. The queries were replied by the petitioner company vide letters dated 13.1.98 and 28.1.98 and it was confirmed that the concrete volute pumps referred in the tender document are supplied to various clients with concrete volute and concrete draft tube without any steel liner. Finally, the respondent no. 2 Nigam conveyed to the petitioner company and the other two bidders that on the documentary evidence and other details submitted by the bidders, the respective bids were evaluated and they were provisionally qualified. It was also mentioned that the Nigam proposed to inspect various reference locations cited by bidders towards qualification requirement and that on the completion of qualification assessment and finalisation of bidders, the post-bid conference would be

held. The Nigam found the petitioner pre-qualified and requested it to arrange for a visit by a letter dated 17th March, 1998. Accordingly, the petitioner arranged for a visit of the reference locations by officers of the respondent nos. 2 and 3 and kept the documents ready during the visit. The petitioner arranged the visit of the officers for the pumping stations installed in Yangier Irrigation System at Uzbekistan. There are three pumping stations at Yangier Irrigation System located at three different stations "A", "B" and "C". The pumps at station "A" are with steel lining since at that particular location, the clients insisted for steel lining, whereas pumps at stations "B" and "C" have not steel linings. The inspection team visited station "A" and since it was satisfied with the technical specifications of station "A", it did not feel necessary to visit stations "B" and "C". The petitioner company forwarded certificate issued by Ministry of Agriculture and Water Resources, Republic of Uzbekistan giving details of the pumps manufactured, supervised, erected, tested and commissioned and their capacity. After the aforesaid visit to the reference location at Uzbekistan, the respondent no. 2 Nigam and its consultants NTPC called for certain documents and certificates from the petitioner/collaborators regarding CVP which were supplied by the petitioner alongwith its letter dated 30.6.98 wherein it was confirmed that the lining in the concrete volute portions are provided as per the requirements of the clients and since in the present project, the Nigam does not desire to have steel lining, the concrete volute pumps would be constructed without steel lining and will be provided with retained steel form work in approximate thickness of 5 mm. The Government of Gujarat has constituted a Tender Purchase committee consisting of (1) Managing Director, S.S.N.N. Ltd. (2) Additional Chief Secretary, Finance Department, Government of Gujarat (3) Secretary (N) N & WRD and Director (Civil), S.S.N.N.L conferring all powers to approve tenders in the State of Gujarat valuing more than Rs. 25 crore. A meeting was held on 5.8.98 wherein all the three bidders i.e. the petitioner company, M/s. Kirlosker Brothers and M/s. G.E.C. Alsthom India Limited were approved for pre-qualification. After being satisfied with the documents submitted, the visit made to the reference location. The Tender Purchase approved the petitioner company for pre-qualification by a letter dated 14.8.98. The respondent no. 2 Nigam also informed the petitioner company that the post-bid conference as per the terms and conditions of the contract would be held on 28th August, 1998. The Nigam also required the petitioner company that its bid is satisfying the

stipulated qualifying requirements and forwarded with its acceptable/unacceptable and declared/undeclared deviations on which it desired to have discussions in the post-bid conference. The observations of the respondent no. 2 Nigam as well as NTPC, their consultant were convinced and satisfied with the data and documentary evidence submitted by the petitioner company vide its letter dated 20th August, 1998 the Nigam confirmed that the petitioner company is meeting with the qualification requirements stipulated in the contract. The petitioner company vide its letter dated 26.8.98 supplied a brief note on the discussions to be held in the post bid conference. The post bid conference was held on 28th August, 1998 where the petitioner and its collaborators from Russia remained present and a thorough elaborate discussion on the deviations was held with the representatives of Nigam and NTPC. In the pre-bid conference, the petitioner company explained satisfactorily the undeclared deviations and those discussions were even confirmed by the petitioner company on the next-date. NTPC, the consultants to the project were fully satisfied with the technology offered by the petitioner company/collaborators. The Tender Purchase committee approved the minutes of the post-bid conference held between the Nigam, NTPC and all the three bidders including the petitioner company. The respondent Nigam had pre-determined to weed out the petitioner company from consideration of its project for extraneous considerations. If the Nigam accepts the tender based on technical data available in envelope-I, without making any changes in the specifications as discussed in the post-bid conference, one of the bidders M/s. Kirloskar Brothers would get a price preference of about Rs. 75 crore over Alstom and Rs. 120 crore over the petitioner company on a tender estimated at Rs. 375 crore. The petitioner supplied further information on the technical aspect and specifically conveyed that it can provide the concrete volute pump with steel lining or without steel lining according to the requirements of the Nigam. After the said visit, the respondents raised certain queries which were replied satisfactorily by the petitioner. Therefore, only the petitioner company was pre-qualified and called for the post-bid conference. But the Nigam again vide its letetr dated 16th March, 1991 raised certain queries which were explained in detail by the petitioner company vide its letter dated 17th March, 1999. The Nigam had pre-determined to weed out the petitioner company from consideration of its project for extraneous considerations. Hence, the petitioner company offered a re-visit to the pumping stations in Republic of Uzbekistan and further discussions with the Technical

Experts and Senior Officials of the Irrigation Ministry of Uzbekistan. The petitioner company sent a letter dated 22nd May, 1998 from its collaborators PEC whereby the collaborators confirmed that the steel lining in the volute pump was provided on client's requirement for erosion consideration. It also confirmed that all other pumps referred in the reference plant as well as in the other pumping station of Karshi Canal are of concrete volute type without steel casing. As the inspection team was satisfied after visiting station "A", they did not feel it necessasry to visit station "B" and station "C". The petitioner sent another letter dated 16th November, 1999 to the Managing Director of the Nigam and offered a discussions with the collaborators at their office at their convenient time. But no response was given. Though the petitioner was informed by a letter dated 18th November, 1999 that no final decision has so far been taken on Saurashtra Branch Canal Pumping scheme and after the policy decision is taken on this issue, they will meet again. The respondent vide its letter dated 21st December, 2000 intimated the petitioner company that the Nigam has decided to disqualify the petitioner company for further process of tender of SBC Pumping Scheme. Thereupon the petitioner company lodged a protest by its letter dated 30th December, 2000 and submitted that the impugned order disqualifying the petitioner has been passed and is based on flimsy grounds and on irrelevant and extraneous considerations. The said action of the respondent Nigam could lead to a single bidder situation inasmuch as one of the three bidders who have been prequalified is a foreign bidder who will have a loading of price of 15% on the FOB price of the equipment as per clause 21.3.2 of Volume I and would therefore, not be able to compete. It is also stated that the pre-qualified bid never contained any stipulation about concrete volute pump without steel liners and therefore, the visit of the inspection team which was after the pre-qualification and before the post-bid conference was also arranged for the volute pumps with steel form work.

3. The petitioner submitted regarding ground nos. 1, 2and 3 stated in the impugned letter at annexure "U" for disqualifying the petitioner that the petitioner has fulfilled all the qualifying requirements as per clause 1.0 qualifying requirements of bidders and none of the sub-clauses pertaining to qualifying requirement specifies unlined concrete volute in the tender. The tender document is silent about the requirement of liner being a qualifying requirement. Even the questionnaire in attachment 3A of the tender document regarding details of specification etc. of previous experience of the

bidders on similar jobs also does not ask anywhere about presence of steel liners in the pumps. Hence, there was no question of referring to or representing to the Nigam as per clauses 1.01.1(f)(g) and (h) referred to in the impugned letter. As regards ground no. 4 about non-furnishing of information, the petitioner stated that the information was never asked for by the Nigam and therefore, there was no question of not furnishing the same. In the contract worth more than Rs. 400 crore, it is not expected of an employer to disqualify a bidder of repute and experience on the trifle ground that a particular details or information was not furnished. The Nigam could have well sought for such an information and the petitioner company would have had no hesitation in furnishing the same to the Nigam. But without asking for such an information, it does not lie in the mouth of the Nigam to weed out the petitioner company from processing its reasonable and acceptable tender. As regards ground nos. 5 and 6, the petitioner has stated that the pumping station inspected by the inspection team of the Nigam was selected on the logistic reasons and in case the team wanted to visit only the station with concrete volute pumps without steel liners, the visit could have been arranged accordingly. However, on extraneous considerations, the Nigam did not consider the requirement of unlined concrete volute pumps as primary qualifying criteria. In the post-bid conference which was attended by several Chief Engineers of the Nigam and NTPC and where various techno-commercial points were discussed in detail, supply of lined and unlined concrete volute pumps was not highlighted and it was left to the bidder to choose lined and unlined pumps as per their convenience and preference.

As regards ground no. 6, the petitioner stated that more than a decade, the petitioner company has shown concrete volute pumps operating for irrigation purpose of capacities similar to biger than the requirement of the Nigam.

4. It is submitted by the petitioner company that the decision of the respondent Nigam for disqualifying the petitioner company has been taken on irrelevant and extraneous considerations on the following facts.

(1) The letter dated 13.1.98 confirming that the concrete volute pumps referred in the tender document are supplied to various clients without any steel liner.
(2) The letter datede 26th June, 1998 of PEC, 30th

June, 1998 of Ukarhydro Project and the letter dated 13th July, 1998 of PEC confirming that the lining in the concrete in the volute portion are provided as per the requirements of the respective client and that the concrete volute pumps for the project would be constructed without steel lining.

(3) The letter dated 15th January, 1999 conveying that the petitioner company can provide the concrete volute pump with steel lining or without steel lining as per the requirements of the respondent Nigam.

(4) The letter dated 22nd January 1999 of NTPC confirming that the petitioner company has clarified the details of the steel form work.

(5) The letter dated 22nd May, 1998 from PEC confirming that the steel lining in the volute pump was provided on respective client's requirement and that all other pumps at Karshi Canal are of concrete volute line without steel casing.

(6) The letter dated 15th March, 1999 of Energomash confirming that pumping station in Karshi Main canal in Uzbekistan includes 7 nos. concrete volute pumps without steel liner and that the same are open for inspection.

5. It is also submitted that the action of the respondent Nigam of disqualifying the petitioner company is arbitrary, high-handed, discriminatory and violative of Article 14 of the Constitution of India and was taken without affording an opportunity of hearing to the petitioner. The petitioner company has been disqualified after a period of two and half years of deliberations and after the petitioners were called for post-bid conference. The decision of the respondent Nigam is against public interest inasmuch as the said disqualification would virtually create a monopoly situation and thus, the decision of disqualifying the petitioner is against public interest, arbitrary and perverse and hence the petitioner company has filed the present petition in this court.

6. Affidavits have been exchanged. I have heard the learned advocates for the parties at length and perused relevant papers.

7. The contention of the learned counsel for the petitioner is that the impugned order is passed in breach of the principles of natural justice and fair play inasmuch as it has been passed without informing the

petitioner of the proposed action. The grounds on which the action was proposed to be taken and without giving an opportunity to the petitioner to show cause against the proposed action are illegal. The Nigam has failed to apply its mind to relevant documents on record and has been influenced by consideration which are not relevant to the technical requirements prescribed in the tender documents for qualification of the bidder. The decision of the Nigam is grossly unreasonable and illegal applying the Wednesbury Principle and that decision is against the public interest. The petitioner was declared pre-qualified by Nigam and that was communicated to the petitioner by its letters dated 14th August, 1998 and 20th August, 1998. The petitioner company has acquired a right to compete for the second stage of bidding or a right to be considered for awarding the contract or a legitimate expectation that the petitioner would be so considered. According to him, the action of the respondent Nigam deprives the petitioner of a legitimate expectation of being considered for grant of the contract or the benefit of having their financial bid considered and competing with the other bidders for the grant of contract. Such order ought not to have been passed without first informing the petitioner of the proposed action and without giving an adequate and reasonable opportunity to meet with the same. Reliance has also been placed by the learned counsel for the petitioner on the decision of the Supreme Court in the case of Tata Cellular vs. Union of India reported in 1994(6) SCC, 651. It is submitted that Tata Cellular was provisionally selected as qualified and therefore short-listed for the second stage of bidding i.e. financial bid, but by subsquent communication, Tata Cellular was disqualified and dropped without giving any opportunity of hearing. This action was challenged on the ground of violation of natural justice. The Supreme Court has held as under :

> "Before doing so as rightly urged by Mr. Soli J. Sorabjee, this appellant ought to have been heard. Therefore, there is a clear violation of the principles of natural justice."

It was also observed as under:

> "In the above two casese, we are obliged to interfere on the ground of arbitrariness and violation of the principles of natural justice confining ourserves to the doctrine of judicial restraint, however, by the applicable of permissible parameters to set right the decision making process."

The learned counsel for the petitioner also placed reliance on the decision of the Supreme Court in the case of Gajanan L Pernekar vs. State of Goa and others reported in 1999(8) SCC, 378 to show that an opportunity of hearing has to be given before the petitioner could be denuded of the benefits of the earlier order. He also relied on the decision of the Supreme Court in the case of State of Kerala vs. K.G.Madhavan Pillai, reported in (1988) 4 SCC, 669 wherein it has been held that if the Government has the power to cancel or revoke its earlier order conferring a benefit of getting their applications further processed, cancellation of the earlier order deprives the petitioner of their right of benefit flowing from such order and therefore, such order cannot be passed without an opportunity of hearing. Disqualifying the petitioner deprives him of the benefit or right acquired by him as a result of the earlier decision or order of being considered for grant of the contract or having their financial bid processed and considered. At least the Government is bound to act fairly in discharging its administrative functions and fair play in action demands that the notice of the proposed action and an opportunity to explain ought to be given before any action resulting in prejudice to any party is taken. The decision to pre-qualify the petitioner company was taken and communicated on 14th August, 1998 and 20th August, 1998. The post bid conference took place on 28th and 29th August, 1998 and the impugned decision reviewing and disqualifying the petitioner was taken on 21.12.2000. The impugned decision disqualifying the petitioner was taken on 21st December, 2000 almost 28 months after the post bid conference. No notice of proposed action and opportunity of hearing was given to the petitioner. Failure to do so vitiates the decision making process.

8. The contention of the learned counsel for the respondent no. 2 Nigam is that an advertisement was given in the newspapers inviting tenders on 9.5.97 for installation of in all 26 concrete volute pumps, each of 20 cumecs capacity and 22 Vertical Turbine Pumps (VT pumps) each of 5 cumecs capacity. One of the essential technical condition is set out in clause 2.01.26.01 of Vol.II book-1 relating to Technical Specifications, categorically stating that the suction duct and the pump volute casing shall be of unlined cast-insitu concrete construction. The suction duct is also called draft tube which is nothing but an entry point for the canal water to enter the pump volute. Volute is a closed chamber placed around the impeller of the pump. Casing means the surface of the volute. Unlined volute/casing means volute/casing with concrete construction without

lining. Cast in situ concrete construction means a concrete construction at the site. Impeller is connected with motor through shaft as a result whereof the water at a higher level having entered from suction duct will be rotated and forced to go up through discharge duct to the down-stream canal at a higher level. The petitioner submitted its offer for supply of CV pumps was without clarification as to whether they would be lined or unlined. The respondent no. 2 Nigam therefore, wrote a letter to the petitioner company raising a specific query, amongst others, as to whether the pumps are without any steel liner or not. By a letetr dated 28th January, 1998 the petitioner company confirmed that their offer was in strict conformity with technical specifications provided in the tender to provide CV pumps without steel liner as per tender specifications. The respondent no. 2 Nigam wrote a letter dated 17.3.1998 to all the bidders granting provisional qualification subject to final decision and indicating that the proposed foreign visit of the Assessment Team to confirm and assess the real capability of the bidders by inspecting various reference locations cited by the bidders with further rider that advance intimation for the post-bid conference should not be construed as their bid fully meeting the qualification requirement as the same would be subject to various confirmations and physical verification at reference plaint to be visited by the Assessment Team. The Assessment Team went to visit the reference plants of all the three bidders including that of the petitioner company in Uzbekistan, Russia. However, during the visit arranged by the petitioner company, it had taken the assessment team to places where CV pumps had 10 mm thick steel lining and consequently the assessment team was neither afforded inspection of unlined CV pumps nor was any material produced before the visiting Assessment Team to show that unlined CV pumps had been installed by the petitioner company. The petitioner company's collaborator PEC sent a letter dated 22nd May, 1998 to the respondent Nigam at the time of visit of assessment team indicating that the pumps at Dhzizak pumping station have 10 mm steel lining/casing on the volute side and the pumps at Karshi canal are without lining/casing. PEC, the collaborator of the petitioner company wrote a leter dated 26th June, 1998 to NTPC informing that it is the standard practice in Russia to provide lining in CV pumps but since respondent Nigam has desired the said CV pumps without steel lining, the same will be provided by retained steel form work in an approximate thickness of 5 mm (steel lining of 5 mm). The Design Consultant of the petitioner company wrote a letter dated 30th June, 1998 showing its

its difficulty in attaining the desired shape of CV pumps without sacrificial steel form work. PEC, the collaborator of the petitioner company wrote a letter dated 13.7.1998 to NTPC in which PEC admitted that CV pumps supplied at Dhzizak Karshi Projects are with steel liners with retained steel formwork as against the requirement of respondent Nigam for CV pumps without steel liners. Thus, the stand ofpetitioner company in the letter dated 22.5.1998 is totally contrary to the stand of PEC, collaborator of the petitioner. The respondent Nigam wrote a letter to the petitioner company stating that it is satisfying the stipulated qualifying requirements requesting it to attend the post-bid conference by stating inter alia that a number of declared/undeclared deviations have been noticed in their bid. Thus, the satisfaction merely qualifies a bidder to participate in the bidding process who is then to comply with tender specifications to prove his capacity and capability to perform the contract. The petitioner company again wrote a letter to the respondent Nigam once again raising the matter relating to steel lining to be discussed in thepost bid conference in clause C of the said letter. The respondent Nigam gave a reply by its letter dated 20th August, 1998 to the petitioner that it was meeting with the qualification requirements and that some of the deviations found in the petitioner company's bid may have effect on the specifications. NTPC wrote a letter dated 22nd January, 1999 to PEC, collaborator of the petitioner company merely acknowledging receipt of the details of steel formwork sent by PEC and it was nowhere clarified by NTPC in the said letter that details of use of steel form in CV pumps was to their satisfaction. The respondent Nigam wrote a letter dated 16th March, 1999 to the petitioner company inquiring about the details concerning CV pumps installed at Karshi canal with their capacity, characteristics and other salient features. The petitioner company replied by its letter dated 17th March, 1999 referring to their collaborator's letter dated 22nd May, 1998 for showing that pumps provided at Karshi Project and other projects are without lining and that was once again contrary to letter written by their collaborator dated 13.7.1998. An intimation from the respondent Nigam was sent to the petitioner company on 21.12.2000 disqualifying the petitioner company for further process of the tender.

9. The contention of the learned counsel for the respondent no. 2 Nigam is that as per clause 2.01.26.01 of volume-II, book-1 of Tender documents entitled "Technical specifications" lays down one of the essential specifications/conditions for the performance

of the contract viz. suction duct and pump volute casing shall be of unlined case in situ concrete construction. The petitioner is not able to prove its capacity and capability for installation of CV pump without lining hence it can be disqualified at any stage of the tender process before awarding of the contract. According to the learned counsel for the respondent no. 2 sent a letter to the petitioner on 17.3.98 stating that due to adminsitrative reasons and subject being complex and important, the qualifying requirement evaluation is under process. The bid was evaluated and provisional qualifications of the bidders were considered by the Nigam subject to final decision of the Nigam to confirm and assess the real capacity of each bidder. It is necessary to inspect various reference locations cited by the bidder towards qualifying requirements. He also referred the letter dated 14.8.1998 wherein it is stated that the bid of the petitioner was satisfying the stipulated qualifying requirements. Hence, the petitioner company was required to attend post-bid conference for discussion on different aspects and the petitioner company was required once again to confirm that its bid is strictly in line with the tender stipulations. He also referred the letter dated 20th August, 1998 sent by the Nigam to the petitioner that the petitioner company is meeting with the qualifying requirements stipulated in the contract. Therefore, the Chief Engineer, Saurashtra Branch canal, Rajkot has already invited the petitioner company vide its letter dated 14.8.98 to attend the post-bid conference on 28th and 29th August, 1998. On the basis of the aforesaid letters, the contention of the learned counsel for the Nigam was that the petitioner company was qualified to participate in the bidding process, but it does not mean that the petitioner company was complying with the tender specifications referred to above which are essential conditions for the performance of the contract. Hence, on the basis of the aforesaid communication, the respondent no. 2 cannot be estopped from disqualifying the petitioner company on finding that it does not have the capacity and capability to perform the contract. It is also argued that the offer of the petitioner company was not only inconsistent, but its bid was not substantially responsive as per clause 23.3 and was not found complying with the essential technical specifications being sine qua non for the performance of the contract and hence the petitioner company was not found possessing the said essential condition relating to eligbility was disqualified on re-examination of the entire matter as per the provisions of clause 24.1 of Volume-1. PEC, collaborator of the petitioner company by

its letter dated 13th July, 1998 confirmed that the pumps designed and supplied by JSC Urahydromash for Djizak and Karshinsky Projects are concrete volute pumps with steel liner as the retained steel formwork. This formwork does not take any structural load and the concrete volute structure is designed and constructed to take care of the structural and hydraulic loads. Hence, these pumps are the concrete volute pumps with steel formwork. Another letter dated 30th June, 1998 of PEC makes it clear that it is not necessary to provide steel lining in the draft tube. However, the Civil Works Contractor is to ensure its proper shape to the design and smooth surfaces for the water flow according to theoretical calculations. The aforesaid provisions are in respect of the concrete volute but as its shape is very complicated, it is difficult to attain the desired shape with the use of the timber formwork. That is why it is not preferable to use sacrificial steel formwork with smooth internal surfaces according to the designed shape and size. In the present project, as the client does not want to have steel lining, it can be proposed to design the structures without lining and all the loads will be borne by the concrete itself. But it must be stressed that execution of the concrete volute without lining near the cog is practically impossible due to small size. He also referred the letter dated 26th June, 1998 of PEC, collaborator of the petitioner company wherein it is stated that the collaborator wish to confirm that the lining for the concrete volute portion of the concrete volute pump and provided as per the requirements of the clients. However, it is the standard practice in Russian to provide lining in the volute portion of the concrete volute pump to get proper and accurate shape for the efficient flow in the pump with least losses. As the petitioner company desires volute of the CVP could also be constructed without steel lining and constructed surfaces in designed lines and profies as well as long term reliable trouble-free operation of all pumps will be provided by retained steel formwork in approximate thickness of 5 mm. A technical note on the subject is also being organised from the Consultant for the project, Ukrhydroproject, Ukraine.

On the basis of these three letters, the learned counsel for the Nigam contended that the petitioner has no experience or does not possess the qualification required as per the tender documents and letters suggest that the pumps are with lining. While on the other hand, other communications of the petitioner company suggest the other stand. The Nigam sent a letter dated 16.3.99 to the petitioner company regarding certain

information after the visit of the assessment team at Russia. The petitioner company was informed that the collaborator has furnished the letter wherein it is specified that the CV pumps which were manufactured and installed at Karshi canal have no lining. The letter dated 17th March, 1999 of the petitioner company sent to the Nigam says that the pumps supplied by the collaborator at the pumping station Karshi main canal includes 7 nos,. concrete volute pumps without steel liners . In the similar manner, PEC, the collaborator of the petitioner company by their letter dated 22.5.98 informed that the pumps at Dhzizak pumping station 10 mm steel lining/casing has been provided on the volute side. Further, on the suction draft tube in the bent portion 6 mm steel lining have been given. These were essentially based on client's requirement from erosion consideration, other than above two pumps in reference plant as well as in other pumping station of Karshi canal (7th stage) or any other CIS countries are of concrete volute type without steel casing.

Thus, the stand of the petitioner company at one time is one and at other time another which are not consistent with each other. At one time, they say that the CV pumps installed at Karshi canal are without lining, while from other documents, it is revealed that in whole of Russian countries, the pumps are being used. CV pumps with steel lining whether it may be 10 mm , 6 mm or 5 mm, but it does not show that those pumps are being installed without steel lining.

10. In the counter affidavit filed by the respondent no. 2 Nigam, it is stated that the assessment team was taken by the petitioner company to the pumping stations in Uzbekistan which had pumping stations with steel lining. It was denied that the assessment team was satisfied with technical specifications of pumping station "A" and the team did not feel it necessary to visit stations "B" and "C". The team had gone to Russia to see as to whether the petitioner company possessed the technical knowledge and expertise in the field of concrete volute pumps without steel liners. But the team was shown only concrete volute pumps with steel lining and it is stated that the pumps installed at Karshi canal were concrete volute pumps without steel liners. While on the other hand, the letter dated 26th June, 1998 shows that all the pumps designed and supplied by Uralhydromash, a principal agency of PEC at Dhzizak and Karshi are with steel liner since it is the standard practice in Russia to provide lining in CV pumps with

steel lining for manufacturing concrete volute pumps. As such, the petitioner did not have any right to raise the dispute after such inconsistent and contradictions on their part. The assessment team was never satisfied that the pumping station "A" and nobody had prevented the petitioner company from taking the said assessment team taken to pumping stations "B" and "C" where the volute pumps were said to be without steel liners. While on the other hand, the petitioner was required to take the assessment team to a place where volute pumps were without steel liners. Thus, the conduct on the part of the petitioner company as well as their collaborator do show volumes about their intentions which did not appear to be bonafide. It appears that at pumping stations "B" and "C" at Karshi there were no volute pumps without steel liners. Hence, the assessment team was not taken to that place. On the other hand, the consultant opined to provide sacrificial steel form work as lining having thickness of 5 mm. The letter dated 13.7.98 of the collaborator PEC clearly shows that the pumps designed and supplied in case of Karshinsky Project in particular are concrete volute pumps with steel liner. The respondent Nigam also desired to have certificate from the owners where the said pumps are installed certifying to the aforesaid effect. In this respect, a query was made and the petitioner vide its letter dated 13.1.98 re-confirmed that its offer is for supply of CV pumps without steel lining and the petitioner has not furnished the certificate from any owner as desired. In the present case, the reasons have been given in the impugned letter for disqualifying the petitioner on the basis of the re-examination of the entire material on record. As such, the action of the respondent Nigam is not in violation of principles of natural justice.

11. The contention of the learned advocate general appearing on behalf of the State is that the project is of a vital importance for the State and any delay in the implementation of the project is prejudicial to the public interest. When Nigam has on consideration of justifiable facts, come to the conclusion that the petitioner is not meeting with the requirement of tender conditions and is disqualified. This court should not sit in appeal over the decision arrived at by the respondent no. 2 Nigam. The decision is based on objective facts and the facts taken into consideration are relevant and germane for ariving at a decision about the disqualification of the petitioner for further consideration. He also relied on the decision of the Supreme Court in the case of M.C.Mehta vs. Union of India reported in AIR 1999 SC, 253 wherein it has been

held as under :

"It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest or the transaction is entered into malafide, the court should not intervene under Article 226 in disputes between two rival tenderers."

It is also submitted that the correspondence produced before the court, disclosed that the petitioner does not have the ability to provide the required technical specification of unlined Concrete Volute Pumps. He submitted that the petition should be rejected on the basis of the letter dated 26th June, 1998 addressed by the petitioner wherein it is mentioned as under :

"Since the client desires, volute of the CVP could also be constructed without steel lining and constructed surfaces in designed lines and profiles as well as long term reliable troublefree operation of all pumps will be provided by the retained steel formwork in approximate thickness of 5 mm."

12. Learned advocate Mr. Vakil for the respondent no. 4 contended that this petition is liable to be dismissed on the suppression of material facts and on legal aspects besides merits which disqualify the petitioner company for further process of the tender. So far as suppression of material facts are concerned, I am not convinced that there is any suppression. The learned counsel for the respondent no. 4 pointed out that the tender does not show regarding installation of the CV pumps with steel liners. In that respect, there is a provision in the tender document regarding velocity. Clause 1.02 requires that sub structures and the operating floor of the pumping stations shall be of RCC of required strength (minimum M 25 grade concrete). If the velocity of water in the draft tube and volute is more than 8 m/sec then steel plate liners shall be provided to overcome the effects of erosion of concrete and pitting due to cavitation. Superstructure of pumping station shall be structural steel frames.

As such, it cannot be said that CV pumps with steel were not required in the document that was subject to high velocity of water flood but the main specific requirement was to instal the CV pumps without steel lining as stated in the tender document. It is also submitted that the decision of the Nigam is not procedurally or substantially arbitrary, or unreasonable or violative of Article 14 of the Constitution of India. The tenderer is required to study the tender document and submit the tender not on the basis of tender notice alone but also the tender documents. The tender work includes manufacturing, supply etc. of 11 nos. of CVP each of 20 cumecs capacity in phase I and 15 nos. of like CVP in Phase II. The tender notice is not a document which is meant to describe exhaustively the scope of the work or the required experience. Para 1.1.(b) of the tender notice provides a qualifying requirement for bidder i.e. bidder should have designed, manufactured, erected supervised erection, tested and commissioned at least 2 CVP pumps each of 14 cumecs or more. The Nigam has a right to assess the bidder's capability and capacity to perform the contract in the overall interest of the Nigam. The letter dated 29.12.97 gave an opportunity to the petitioner to clarify certain queries in the contest of petitioner's technical bid and the petitioner's qualifications and that was for CV pumps without any steel liners for the volute pumps and the petitioner was required to furnish certificates from the owner certifying each parameters. However, the reply of the petitioner company was evasive in the matter of furnishing the owner's certificate. The letter dated 30th June, 1998 says that though structurally it is not necessary to provide steel lining in the draft tube, but as the shape is very complicated, it is difficult to attain the desired shape with the use of the timber formwork and it was therefore preferable to use sacrificial steel formwork as lining. Though the petitioner offered to design the structure without lining, they pointed out the execution of the CV pump without lining near the cog was practically impossible due to small size. On the inconsistent stand of the petitioner, the Nigam was justified in proceeding on the basis that there was no satisfactory evidence that the petitioner and its collaborators have experience of designing and manufacturing CV pumps without steel lining. It is also contended by the learned counsel for the respondent no. 4 that the petitioner's plea that it had been pre-qualified and could not be disqualified for further consideration is erroneous. The petitioner has been given various opportunities to produce the evidence

to show that they have experience of installing CV pumps without steel liner, but the petitioner could not do so.

13. The learned counsel for the respondent Nigam contended that no doubt this court has power of judicial review of the administrative action in order to prevent arbitrariness, favouritism and unreasonableness where the action is in violation of the principles of natural justice subject to inherent limitations. Where fairness is shown by the decision maker, no breach of natural justice can be complained of. Fairness of procedure, fair play in action, duty to act fairly are substitutes of natural justice. Fairness does not require plurarity of hearings or representastion. If an action of Government is fair and in public interest, even if it is faltered in its wisdom, the court cannot act as super auditor. Even if the petitioner has remote chance of success, the court can exercise its discretionary power refusing to entertain the petition unless there is a violation of statutory provisions for the observance of natural justice. If the decision has been taken in bonafide manner although not strictly following the norms laid down by the court, such decision is liable to be upheld. If the Government or its undertaking acts fairly to all concerned persons, even if some defect is found in the decision making process, the Court must exercise its discretionary power only in furtherance of public interest and not merely on the making out a legal point. In the present case, the respondent no. 2 Nigam has acted fairly giving a reasonable opportunity to the petitioner. Hence, the petitioner company no right for further opportunity of hearing. The respondent no. 2 has taken the decision in the public interest. Hence that action does not require any interference by this court in the extraordinary jurisdiction under Article 226 of the Constitution of India. In support of his contention, he relied on the following decisions of the Supreme Court.

1. Centre for Public Interest Litigation vs. Union of India and others reported in 2000(8) SCC, 606 regarding the judicial review of administration action. The Supreme Court in the aforesaid decision referred the observations of the Supreme Court in the case of Tata Celluler vs. Union of India reported in 1994(6) SCC, 651 which are as follows :

"21. While considering the allegations the allegations levelled against the acceptance of the impugned contract, we may usefully refer to the observations of this Court in the case of

Tata Cellular vs. Union of India which are as follows: (SCC headnote)

"The principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether constractual or political in nature or issue of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

The judicial power of review is exercised to rein in any unbridled executive functioning. The restraing has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallamarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the court cannot substitute its own

decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the court would interfere. It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The duty of the court is thus to confine itself to the question of legality. Its concern should be :

(1) Whether a decision-making authority exceeded its powers ?
(2) committed an error of law,
(3) committed a breach of the rules of natural justice,
(4) reached a decision which no reasonable tribunal would have reached or,
(5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classifed as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury, unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

(iii) Procedural impropriety."

2. The Chairman, Board of Mining Examination and Chief Inspector of Mines and another reported in AIR 1977, SC, 965. The Supreme Court has observed as under:

"If fairness is shown by the decision maker to the man

proceeded against, the form, the features and fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of."

3. In the case of Management of M/s. M.S.Nally Bharat Engineering Co.Ltd. vs. State of Bihar and others reported in 1990(2) SCC, 48, the Supreme Court has held as under:

"It may be noted that the terms "fairness of procedure", "fair play in action", "duty to act fairly" are perhaps used as alternatives to "natural justice" without drawing any distinction."

It is further observed as under:

"We share the view expressed by Professor Jackson, Fairness in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern state is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness is also a principle to ensure that statutory authority arrives at a just decision either in promotions interest or affecting the rights of persons. To use the time hallowed phrase "that justice should not only be done but be seen to be done" is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procledure. It depends upon the facts of each case. As Lord Pearson in "Pearlberg vs. Varry (at page 547), fairness does not necessarily require a plurality of hearing or representations and counter representation. Indeed, it cannot have too much elaboration of procedure since wheels of administration must move quickly."

4. In the case of Raunak International Ltd. vs. I.V.R.Construction Ltd. and others reported in AIR 1999, SC, 393, the Supreme Court has re-affirmed the observations of the Supreme Court in the case of Fertilizer Corporation Kamgar Union vs. Union of India, (AIR 1981, SC, 344) as under:

"If Directorate of a Governmen t company has acted

fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from taint of unreasonableness and has substantially complied with norms of procedure set for it by rules of public administration."

Regarding the contractual transaction in the tender matter, the Supreme Court relied on certain decisions of the Supreme Court in other cases, has circumscribed the scope of judicial review and has made observations in paras 22 and 23 as under :

"22. In Tata Cellular vs. Union of India (1994) 6 SCC, 651 (1994 AIR SCW 3344), this Court again examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of that power of judicial review. The Court also observed the right to choose cannot be considered as an arbitrary power. Of course, if this power is exercised for any collateral purpose, the exercise of that power will be struck down. " Judicial quest in administrative matters has been so find the right balance between the administrative discretion to decide matters and the need to remedy any unfairness. Such an unfairness is set right by judicial review. " After examining a number of authorities, the Court concluded (at page 687) (of SCC) (at page 3378 of AIR SCW) as follows:

(1) The modern trend points to judicial restraint in administrative action.
(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.
(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.
(5) The Government must have freedom of contract. In other words, a fair play in the joints is a

necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

23. The same view has been reiterated in Asia Foundation and Construction Ltd. vs. Trafalgar House Construction (I) Ltd. (1997) 1 SCC 738, the Court observing that judicial review of contractual transactions by Government bodies is permissible to prevent arbitrariness, favouritism of use of power for collateral purposes. This Court added a further dimension to the undesirability of intervention by pointing out that where the project is a high cost project for which loans from the World Bank or other international bodies have been obtained after following the specifications and procedure of such a body, it would be detrimental to public interest to interfere. The same principles have been also reaffirmed in New Horizons Ltd. vs. Union of India (1995) 1 SCC 478: (1995 AIR SCW 275) with this Court again emphasising the need to allow for certain flexibility in administrative decision-making, observing that the decision can be challenged only on the Wednesbury principle of unreasonableness i.e. unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. In Delhi Science Forum vs. Union of India (1996) 2 SCC 405: (1996 AIR SCW 953), this Court once again observed that if a reasonable procedure has been followed the decision should not be challenged except on the Wednesbury principle of unreasonableness."

5. In the case of Sterling Computers Ltd. vs. M and N Publications Ltd. and others reported in 1993(1) SCC, 445, the Supreme Court has observed as under:

"If the decisions have been taken in bonafide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Hopmes, that the courts while judging the constitutional validity of executive decisions must grant certain measures of freedom of "play in the joints" to the executive."

6. In the case of Air India vs. Cochin International Airport Ltd. and others reported in 2000(2) SCC, 617, the Supreme Court has held as under:

"The State, its Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

7. In the case of M.C.Mehta vs. Union of India reported in AIR, 1999, SC 2583, the Supreme Court while discussing the observations of natural justice has made the following observations:

"Wade (Administratie Law 5th Edition, 1994 page 526-530) says that while futile writs may notbe issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or undisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a "real likelihood" of success or if he is entitled to relief even if there is some remote chance of success. We, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their "discretion" refuse certiorari, prohibition, mandamous or injunction even though natural justice is not followed"

Thus, where there is a statutory requirement for notice or giving an opportunity of hearing the court should issue writ for the observance of natural justice otherwise facts of case may require to refuse issuance of writ. It is not necessary in all cases that the Court should issue writ for observance of natural justice. Each case is considered on its facts and circumstances.

14. Before adverting to the legal aspects raised by the learned counsel for the petitioner, I would

like to examaine the question as to whether the petitioner company has technical knowledge and manufacturing experience for supply the CV pumps without steel liners and whether there is a material on record to show that the petitioner company has such experience and knowledge ? Clause 01.26.01 of the Volume II book I of Tender document requires technical specifications that the suction duct and pump volute casing shall be of unlined cast in situ concrete construction. The Nigam found that the petitioner has not made it clear in its offer as to whether CV pumps would be lined or unlined. Hence the Nigam required the petitioner company to make it clear and a query was made on 29th December, 1997 "Please re-confirm that the list furnished for qualification purposes is for the concrete volute pumps i.e. the pumps are without any steel liner for volute and draft tube. " The petitioner company replied the query by a letter dated 13.1.98. " We confirm that the list referred in our tender submissions for concrete volute pumps contain pumps which are supplied to various clients with concrete volute and concrete draft tube without any steel liner." The petitioner company again confirmed by the letter dated 28.1.98 that they wished to confirm their offer strictly in line with the technical specifications (meaning thereby to provide CV pumps without steel liner as per tender specifications). The Nigam sent letters to all biders including the petitioner company to grant provisional qualifications subject to final decision after inspection by assessment team at the reference locations is made and thereafter post bid conference will be held. The petitioner company made arrangement for the visit at reference plant in Uzbekistan, Russia but it had taken the Assessment Team to places where CV pumps had 10 mm thick steel lining. But the team was not shown the places where CV pumps were installed by the petitioner company were of without liners. PEC, the collaborator of the petitioner company gave a letter dated 22.5.98 to the Assessment Team indicating that the pumps at Dhzizak pumping station have 10 mm steel lining/casing on the volute side and the pump sets Karshi canal are of without lining/casing. But PEC, the collaborator of the petitioner company sent a letter dated 13.7.98 stating therein " We would like to confirm that the pumps designed and supplied by JSC Urelhydromas for Djizak and Karshinsky projects are concrete volute pumps with steel liner as the retained steel form work. This work does not take any structural load and the concrete volute structure is designed and constructed to take care of the structural and hydraulic loads. Hence, these pumps are the concrete volute pumps with steel formwork." PEC, the collaborator of the petitioner

company sent a letter dated 26.6.98 stating therein " We wish to confirm that the lining for the concrete volute portion of the concrete volute pumps and provided as per the requirements of the clients. However, it is the standard practice in Russia to provide lining in volute portion of the concrete volute pump to get proper and accurate shape for the efficient flow in the pump with least losses since the client desires volute of CVP could also be constructed without steel lining and constructed surfaces designed lines and profiles as well as long term reliable trouble-free operation of all pumps will be provided by retained steel form work in approximate thickness of 5 mm. A technical note on the susbject is also being organised from the consultant for the project, Ukrhydroproject, Ukraine." The consultant of the PEC, collaborator of the petitioner company, sent a letter dated 30.6.98 stating therein "Structurally, it is not necessary to provide steel lining in the draft tube. However, the Civil Works Contractor is to ensure its proper shape to the design and smooth surfaces for the water flow according to theoretical calculations. The above said provisions are also applicable to the concrete volute, but as its shape is very complicated, it is difficult to attain the desired shape with the use of the timber formwork./ That is why it is preferable to use sacrificial steel formwork with smooth internal surfaces according to the designed shape and size.

It is the sole discretion of the contractor to consider the sacrificial steel formwork (t=5) as lining and implement the design of the structures that will bear all the loads.

In this Project, as the client does not want to have steel lining, we propose to design the structures without lining and all the loads will be borne by the concrete itself. But it must be stressed that execution of the concrete volute, without lining, near the cog is practically impossible due to small size."

The petitioner company addressed a letter dated 18.8.1998 to the respondetn Nigam wherein the petitioner company desired to discuss the benefits and necessities of the sacrificial steel lining in pump in the post bid conference. The Nigam replied by the letter dated 20.6.98 that some of deviations found in the petitioner's bid may have effect on specfications.

In the re-joinder affidavit, the petitioner company stated that offer of the petitioner company is with steel form work. However, it is

attempted to say that the steel formwork is not a steel liner but is a sacrificial form work i.e. a mould which is optional and can be removed without any loss of strength to the concrete. When the Nigam inquired from the petitioner company by its letter dated 16.3.99 about the details of CV pumps installed at Karshi canal with their capacity, characteristics and other salient features, the petitioner replied referring the letter dated 22.5.98 of PEC. This stand of the petitioner company is contrary to the statement made in the letters dated 26.6.98 and 30.6.98 stated above. The Nigam also required a certificate of owner of any project where petitioner company has installed CV pumps without lining but no such certificate was furnished to the Nigam. As such, it appears in the facts stated above that the petitioner company has knowledge and experience of manufacturing and installing CV pumps with steel lining. Considering the facts and circumstances of the petitioner company to the Nigam, I am constrained to hold that the petitioner company failed to show that the petitioner company has any experience and knowledge of manufacturing and installing the CV pumps without steel lining. Moreover, the petitioner company has taken an inconsistent stand in this respect in its letters.

15. Now, turning to the legal aspects raised by the learned counsel for the petitioner, he submitted that the petitioner company was provisionally qualified after examining the tender documents. The petitioner company was allowed to take the Assessment Team for inspection of the plants where CV pumps were installed by the petitioner company. The Assessment Team was fully satisfied with the technology of the petitioner company and the petitioner company was found qualified and was called to attend the post bid conference and after the meeting, the respondent Nigam was fully satisfied and the petitioner has already supplied relevant material required by the Nigam. Thus, the petitioner was found fully competent and qualified for installing the CV pumps without steel lining. After a period of 28 months from the post-bid conference, the respondent Nigam disqualified the petitioner for extraneous considerations without giving an opportunity of hearing for proposed action, by a letter dated 21st December, 2000. The action of the respondent Nigam is in violation of the principles of natural justice, suffers from non-application of mind and unfair.

16. Now, I will examine the contention of the learned counsel for the petitioner that the impugned letter dated 21st December, 2000 of the respondent Nigam

whereby the petitioner company has been disqualified for further process of the tender bid is illegal, void and in violation of principles of natural justice as the petitioner has not been given an opportunity of hearing for the proposed action for disqualifying the petitioner company for further process of tender and the petitioner company has not been given an opportunity to explain it. The learned counsel for the petitioner company referred to three letters of the respondent Nigam dated 17th March, 1998; 14th August, 1998; and 20th August, 1998 wherein it is stated that the petitioner company was found qualified to participate in the bid process. In the first letter dated 17th March, 1998 it is stated that based on the cited reference as well as documentary evidence and other details submitted, the bid was evaluated and provisional qualification of the bidders was considered by Nigam subject to final decision of Nigam, to confirm and to assess real capability of each bidder, it is necessary to visit and inspect the various reference locations cited by bidders towards qualification requirement. In the second letter dated 14th August, 1998 of the respondent Nigam, it is stated that the petitioner's bid is satisfying the stipulated qualifying requirements in respect of the bid submitted by the petitioner company for the subject contract. In the third letter dated 20.8.98 of the respondent Nigam addressed to the petitioner company, it is stated that the petitioner company in respect of the bid submitted by it, the petitioner company is meeting with the qualifying requirements stipulated in the contract. Therefore, the Chief Engineer, Saurashtra Branch Canal, Rajkot has already invited the petitioner vide his letter dated 14.8.98 to attend the post bid conference on 28th and 29th August, 1998. The learned counsel for the petitioner company relied on the proposition of law laid down by the Supreme Court in the case of Tata Celluler vs. Union of India (Supra) in which the party was provisionally found to be qualified and provisionally selected for franchise for providing celluler services at Delhi on non-exclusive basis and by a letter dated 27th August, 1993 the party was disqualified for further process of tender and the letter dated 12th October, 1992 was directed tobe cancelled. The contention of Mr. Soli Sorabji that before doing so, the party ought to have been heard and that is a clear violation of principles of natural justice, has been accepted by the Apex Court. The Supreme Court has further observed as under:

"In the above two cases, we are obliged to interfere on the ground of arbitrariness and violation of principles of natural justice confining ourselves to the doctrine of

judicial restraint, however, by the applicable of permissible parameters to set right the decision making process."

He further relied on the decision of the Supreme Court in the case of State of Kerala vs. K.G.Madhavan Pillai, reported in 1988(4) SCC, 669 wherein it has been held that even if the Government has power to cancel or revok its earlier decision conferring a benefit of getting their applications further processed. Cancellation of the earlier order deprives the petitioner of their right of benefit flowing from such order and therefore, such order cannot be passed without an opportunity of hearing. The order results in depriving the person of his legitimate expectations. He also relied on certain authorities in this respect.

16. In the same manner, the petitioner company was found provisionally qualified meeting with the stipulated qualified requirements in respect of the petitioner's bid as stated above. Without giving an opportunity of hearing to the petitioners for the proposed action of disqualifying the petitioner company, the impugned order/letter dated 21st December, 2000 is in violation of the principles of natural justice, arbitrary, unreasonable and hence is liable to be quashed and set aside.

17. I have carefully considered the contentions of the learned counsel for the petitioner. In my opinion, the proposition of law laid down in the case of Tata Celluler vs. Union of India (Supra) has no application in the facts of the present case, inasmuch as in the said case, the Supreme Court did not find any ground or reason for disqualifying the party or cancellation of the selection of the party concerned. But in the present case, the impugned letter dated 21st December, 2000 gives out as many as eight reasons or grounds for disqualifying the petitioner company for further process of bidding which are enumerated as under:

(i) Under clause 1.01.01(f) of section GO, Vol-II of tender, the bidder is obliged to carefully examine and understand the specifications and seek clarifications, if required, to ensure that they have understood the specifications. You did not seek any such clarification on whether the concrete volute pump should be lined or unlined.

(ii) Under 1.01.01(g) of Section GO Vol-II of tender, if the bidder feels, that in his opinion, certain features brought in his offer are superior to what has been specified, this may be highlighted

separately. This was not done by you. Under 1.01.01(h) of Section GO Vol-II of tender any deviation/variation from the scope, requirement and/or intent of the specification shall be clearly defined under the deviation schedule. This was not done by you. The question, therefore, of the deviation being considered for acceptance by the Nigam did not arise.

(iii) Since the Bid Document clearly specified in the technical specifications in Section M-I of Vol-II of the tender that the concrete volute pumps shall have the suction duct and the pump volute casing of unlined cast in-situ, concrete construction, therefore, you were clearly aware of the expertise, technical knowledge and manufacturing experience in respect of which you have to provide satisfactory evidence.

(iv) You had produced evidence of the technical knowledge and manufacturing experience in Bid documents, which did not indicate whether the CV pumps which you have installed, were with lining or without lining.

(v) The Nigam vide letter dated 29.12.97 sought from you reconfirmation that the list furnished for qualification purposes is for the concrete volute pumps i.e., the pumps are without any steel liner for the volute and draft tube. Your reply dated 13.01.98 confirmed that the lists referred to in the tender for concrete volute pumps contain pumps which are supplied to various clients with concrete volute and concrete draft tube without any steel liner.

(vi) The site visit arranged by you to Uzbekistan took the Assessment Team consisting officials of SSNNL and NTPC to places where CV pumps had 10 mm thick steel lining. You and your collaborator PEC sent some communication on 13.01.98 and 22.5.98 which purported to indicate that you have installed CV pumps without steel lining. But the Assessment Team was neither given inspection of those pumps nor has any material been produced to show that CV pumps without lining have been installed. On the other hand, by letters dated 26.6.98 and 13.7.98 addressed by PEC to the members of the Assessment Team, the type of pumps described therein and offered to be manufactured for the SSNNL were shown to be having 5 mm thick steel lining.

(vii) You had taken diverse and inconsistent stand about the type of CV pumps in respect of which you have the technical capability, knowledge and

manufacturing experience. It appears from the correspondence and visit of Assessment Team that the pumps that you have purported to supply are not of the type specified in the bid document. You have not provided satisfactory evidence that you are manufacturer who regularly manufactures equipments of the type specified in bid and/or that you have adequate technical knowledge and manufacturing experience.

(viii) In accordance with clause 23.1 read with 23.3 of section-II, ITB, Vol-I of tender therefore your bid is not substantially responsive and is not meeting the qualifying requirements.

18. On going through the the process, it appears that for qualifying the requirement of technical bid, there were three stages.

(1) Submission of tender documents alongwith other documents required under the terms of the tender.

Thereafter, examination of the document by the concerned committee. If the authority comes to the conclusion that if any bidder is not certain on a particular term or specification or lacking any document under terms of the contract, then the aurhotrity requires such information or document as in the present case, the petitioner had not mede the clarification in the document of the technical bid that its offer was to supply and commissioning of CV pumps with lining or withoutlining. Hence, the Nigam sent a query on 29.12.97 to the petitioner. The petitioner replied by letetr dated 13.1.98 that the petitioner company categorically confirmed to supply CV pumps without steel liner. The Nigam also required from the petitioner company the certificate of the owner of the plant where the petitioner company or its collaborator supplied , erected and commissioned CV pumps without steel liner but that has not been yet furnished. On the basis of the documents, by a letter dated 17th March, 1998, the Nigam informed all the three bidders that the bids were evaluated and provisional qualification of the bidders were considered by the Nigam subject to final decision of the Nigam. To confirm and assess the real capability of each bidder, visit and inspection of reference locations cited by the bidders was to be made by the Assessment team of the Nigam. If on the basis of the statement of the petitioner that it will supply CV pumps without lining, the Nigam issues letter granting provisional qualification of bidder, the bidder cannot have a right to say that it has been provisionally found qualified as 2nd and 3rd stages of technical process have to be passed for qualification requirement.

(2) The second stage for qualification requirement of technical bid was the visit and inspection by Assessment team at the reference locations cited by the bidder. The assessment team visited and inspected the reference plants of the petitioner company in Uzbekistan, Russia during 17.5.98 to 31.5.98. The petitioner company knowing that the essential requirement of the tender did not show the plants where they supplied, erected and commissioned CV pumps without steel lining.

(3) The third stage for qualifying requirement is the post bid conference which was held on 28th and 29th August, 1998 which was attended by all the three bidders. Even before post bid conference, letters dated 14.8.98 and 20.8.98 were sent by the Nigam to the petitioner company stating that the petitioner company is satisfying the stipulated qualifying requirements. The petitioner company cannot claim vested right for further process of bid more particularly the petitioner company has not taken the Assessment Team for inspection to any plant where the petitioner company has supplied C.V. pumps without steel liner. The Nigam could have disqualified the petitioner for further process of bid at that very stage, but the Nigam has given further opportunity to the petitioner company to show its capability of supplying CV pumps without liner and invited the petitioner company for discussion on deviations proposed by the petitioner though no deviations were acceptable by the Nigam and the petitioner company was again required to confirm the bid strictly in the line of tender stipulations. Even after having been given an opportunity of hearing and discussion in the post bid conference and lateron in communications, the petitioner company could not be able to satisfy that the petitioner possesses knowledge and experience of supplying CV pumps without steel liner. The Nigam re-examined the entire record and came to the conclusion that the petitioner does not meet with the qualifying specifications and does not possess essential qualification of supplying CV pumps without liner and declared the petitioner disqualified for further process of bid by the impugned letter dated 21.12.2000. Mere delay in re-examination of the entire record and declaring the petitioner company as disqualified for further bid process is no ground for interference. Even if further opportunity is given to the petitioner by this Court, then also there would be very remote chance for the petitioner to prove its capability of supplying CV pumps without lining and rather it is difficult for the petitioner to prove its capabilities as there is nothing on record to reflect otherwise. Moreover, it appears

that the petitioner would not be able to show that the petitioner is qualified for further bid process as the petitioner has not been able to show that it has experience and capabilities of supplying CV pumps without steel liner nor it has furnished any certificate from the owner of any plant where the petitioner has supplied, erected and installed CV pumps without steel liner. The petitioner company could have produced such a certificate before this Court to show its capability during the course of arguments, but it has chosen not to do so. Mere, bare assertions of the petitioner or its collaborator about its capability in the absence of satisfactory material are not acceptable. Thus, the Nigam appears to be justified in disqualifying the petitioner by impugned letter without giving further opportunity of hearing. It would be a futile exercise for this court to issue a writ providing further opportunity to the petitioner. Further, the basis of proposition of law laid down by the Supreme Court as stated above, the respondent Nigam is not required to give opportunity to the petitioner to prove its capability of supplying and installing the CV pumps without steel liner by giving another opportunity of revisiting at Uzbekistan at places B and C where the C.V. pumps have been installed with steel liner as it appears from the comminications of the petitioner company or its collaborator. Thus, sufficient opportunity has already been provided to the petitioner company to show its capability of supplying CV pumps without steel liner and the decision of the Nigam disqualifrying the petitioner for further process bid is not violative of principles of natural justice.

19. So far as malafides alleged against the respondent Nigam are concerned, the learned counsel for the petitioner submitted that the Nigam was intending to award the contract to the newly added respondent no. 4 to eliminate the petitioner company in the competition and as the condition prescribed in the corrigendum was subsequently deleted in order to make favour to the respondent no. 4 and there was an additional burden of 15% on the third bidder which is a foreign party. After eliminating the petitioner from the tender, now remains only Kirloskar Brothers, the respondent no. 4 in the field. The petitioner been has disqualified for extraneous considerations. I do not find any susbtance in the malafide allegations raised by the petitioner against the respondent Nigam inasmuch as the condition prescribed by the Nigam in the corrigendum wherein the bidder was required to have at least two volute pumps erected at two different places, was deleted at the

initial stage and not at the subsequent stage to make favour to the respondent no. 4. The price bid has not yet been opened. Hence, it cannot be said that the third bidder of foreign country will not be awarded order due to additional burden of 15%. There is nothing on record to substantiate the malafide allegations made against the respondent Nigam. In absence of any cogent and reliable evidence or material on record, I am not able to satisfy myself on the basis of material on record that the submissions made on behalf of the petitioner company that the Nigam's decision is affected by any extraneous considerations or the respondent Nigam has adopted any measures in order to favour the respondent no. 4 or disfavour the petitioner.

20. Saurashtra Branch Canal is a major project costing more than Rs. 400 crores. The respondent Nigam wants to utilise best technology. They do not want it to be handled by inexperienced persons. Hence they are trying to find out and select a person or company having full knowledge and experience of supplying, erecting and commissioning CV pumps without lining. The respondent Nigam has observed complete fairness in dealing with the matter of tender and afforded full opportunity to the petitioner to prove its capability of specifications requirement in the larger public interest. But the petitioner could not prove its capability for doing job work and took divergent stands. The bare assertion that the petitioner is capable of providing CV pumps without liner are not acceptable in view of the fact that the Assessment team was not taken to the place by the petitioner to a place where the CV pumps without liner were installed by the petitioner company, though the petitioner company was fully aware what was the specification requirement, nor thepetitioner furnished certificate of any owner of plant where the petitioner company has erected or installed CV pumps without lining. Thus, the action of the respondent is fair in declaring with the tender matter and is not arbitrary, unreasonable or in violation of principles of natural justice. The petition is thus, devoid of merits and deserves to be dismissed.

21. Accordingly, the petition is dismissed. Notice discharged with no order as to costs. Interim relief, if any, stands vacated.

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After pronouncement of the judgment, the learned counsel for the petitioner makes a request to continue the interim relief for a furtehr period of two weeks which has been granted by this Court during pendency of this petition. I do not find any good reason to accept the request made by the learned counsel for the petitioner and hence the same is rejected.

Date: 11.6.2001 (Kundan Singh,J)

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